IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 6 of 1988

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI
and
Hon'ble MR.JUSTICE KUNDAN SINGH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

SILK MUSEUM
Versus
COMMISSIONER OF INCOME-TAX

Appearance:
1. INCOME TAX REFERENCE No. 6 of 1988
MR RK PATEL for Petitioner.
MR BB NAIK, Sr.Standing Counsel for respondent.

CORAM : MR.JUSTICE R.K.ABICHANDANI
and
MR.JUSTICE KUNDAN SINGH

Date of decision: 23/04/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE R.K.ABICHANDANI for the Court)

1. The Income-tax Appellate Tribunal, Ahmedabad Bench "A" has referred under Section 256(1) of the Income Tax Act, 1961 (hereinafter referred to as the " said Act"), the following question for the opinion of this Court:

"Whether the Tribunal has erred in law in not following settled legal position and established law on the said subject of rules, practice and procedure of evidence, natural justice and fairplay while confirming the addition of Rs.1,40,000/- relying upon `inadmissible evidence' and ignoring ` undisputed evidence' adduced by the assessee.?"

2. The matter pertains to the assessment year 1981-82. The assessee was a partnership firm dealing in sarees at Rajkot and doing its business since 1st November, 1979. The assessee filed Return of its income on 17th July, 1981. During the assessment proceedings, the Department came in possession of some information to the effect that for acquiring the business premises on rent, the assessee firm had paid certain amount by way of "pagri". As recorded in paragraph 5 of the draft assessment order, the premises occupied by the assessee were previously in possession of M/s. Mansukh Stores. Pursuant to the report made by Shri R.J. Vyas, Inspector of Income-tax, which revealed that certain amount was received by the landlord from the assessee, the Income-tax Officer issued summons under Section 138 to the landlord Shri Haresh Jadavji Parekh and recorded his statement on 26-3-1984 as noted in paragraph 5 of the assessment order. The report of Shri R.J. Vyas was placed on record. We are emphasizing this aspect because earlier at no point of time till the Tribunal has decided the matter was it ever urged that the copy of the report of Mr. Vyas was not given to the assessee. However, even that report will pale into insignificance because of the fact that the authorities have not based their conclusions on that report but have relied upon the statement of one Bhupatrai C. Doshi who was a partner in M/s. Mansukh Stores alongwith his wife Vidyaben who had vacated the premises after occupying it for nearly 25 years and as per which statement, the assessee had given Rs.1 lakh for handing over possession of the premises to Vidyaben. There is admission in the statement of Bhupatrai C. Doshi which was recorded by the Income-tax Officer on 26-3-1984 that a total amount of Rs.1,20,000/was received from the assessee, out of which,

the amount of Rs.20,000/- was paid by cheque towards cost of furniture. Shri Doshi had also stated that a sum of Rs.40,000/- was given by the assessee to the landlord for the premises. At the request of the assessee, copies of the statements of Harish Jadav Parekh and Bhupatrai C. Doshi which were recorded by the I.T.O. on 26-3-1984 were furnished to the assessee as recorded in paragraph 8 of the said draft order. The Income-tax Officer noted that the statement of Shri Doshi that a cheque of Rs.20,000/- was given by the assessee towards furniture was borne out from the assessee's own books of account, in which it was stated that a sum of Rs.20,000/-was paid by cheque to Smt. Vidyaben B. Doshi of Mansukh Stores for wooden cupboards, "Gadi", "Takkia" etc. The Income-tax Officer, therefore, added Rs.1 lakh paid by the assessee to Smt. Vidyaben Doshi and Rs.40,000/-paid to Harish Jadavji Parekh as the unaccounted income of the assessee, since it was not entered in the books of account of the assessee.

2.1 Against the said draft assessment order dated 29th March, 1984, the only objection that was raised by the assessee in its communication dated 30th March, 1984 at Annexure "E" to the paper-book was that no "pagri" was paid by the assessee, and therefore, it objected to the inclusion of Rs.1,40,000/- on that ground. The Inspecting Assistant Commissioner of Income-Tax by his directions dated 19-9-1984, issued under Section 144-B of the said Act (at Annexure "H" in the paper-book). noted that as per its earlier directions, the Income-tax Officer had given an opportunity to the assessee to cross-examine the witnesses. He also took note of the fact that the affidavit of Smt. Vidyaben B. Doshi was being produced alongwith written submissions filed before him on 19-6-1984. On the basis of the record, he observed that the additions made by the Income-tax Officer in the draft order were justifiable and no interference was called for. The Income-tax Officer was, therefore, directed to make a final assessment order in the matter.

2.2 Accordingly, the Income-tax Officer made the assessment order on 20-9-1984 adding the amount of Rs.1,40,000/- in the income of the assessee as the amount paid by way of "pagri" which did not find place in the books of account of the assessee. As discussed in paragraph 9 of his order, the Income-tax Officer finding that the version of Shri Doshi about having received the amount of Rs.1,20,000/-, out of which, Rs.30,000/- was received by way of cheque from the assessee was reliable, came to the conclusion that the said amount was

includible in the total income of the assessee being the amount paid out of the books from the income from undisclosed sources.

3. The C.I.T. (Appeals) considered this item in paragraph 4 and 5 of its order dated 21-3-1984 in the appeal which was preferred by the assessee and deleted the same by observing that the evidence of Bhupatrai C. Doshi was only hearsay and the actual tenant Smt. Vidyaben B. Doshi has denied having received any "pagri" in her affidavit filed before the I.A.C.

4. The Revenue appealed against the order of the C.I.T. (Appeals) before the Tribunal and the Tribunal on a detailed appreciation of the evidence on record held that the assessee-firm had in fact paid Rs.40,000/- to the landlord Shri Parekh and Rs.1 lakh to the outgoing tenant Smt. Vidyaben by way of "pagri" and that the said amount of Rs.1,40,000/- was paid out of the books from the income derived from undisclosed sources. The order of the C.I.T.(Appeals) was, therefore, set aside on this count and the order of the Income-tax Officer was restored.

5. The learned Counsel for the assessee argued before us that the finding of the Tribunal was vitiated and it was unsustainable because it was based on inadmissible evidence. It was contended that a copy of the report of the Income-tax Inspector was not furnished to the assessee, and therefore, it could not have been relied upon. It was also contended that the affidavit of Vidyaben B Doshi had gone unchallenged and, according to her, no "pagri" was paid to her by the assessee. According to the learned Counsel, the authorities were bound to rely on this affidavit. It was then argued that the provisions of Section 69 of the said Act were not applicable to the assessee-firm because the firm was constituted under the partnership deed dated 23rd November, 1979 and had commenced its business from 1-11-1979. Therefore, the amount in question could not have been considered as investment from the income in the first year of the business of the assessee. It was argued that even though this question did not arise from the order of the Tribunal we should examine it because it was a pure question of law going to the root of the matter.

6. In support of his contentions, the learned Counsel for the assessee relied upon the following decisions:

(A) The decision of the Supreme Court in KISHINCHAND CHELLARAM VS. COMMISSIONER OF INCOME-TAX, reported in [1980] 125 I.T.R. 713, was cited to point out that it was held therein that before the income-tax authorities could rely upon the letter, they were bound to produce it before the assessee so that the assessee could controvert the statements contained in it by asking for an opportunity to cross-examine the Manager of the bank with reference to the statements made by him. It was held that the statements of the Manager in the letter were based on hearsay and that the Department ought to have called upon the Manager to produce the documents and papers on the basis of which he made the statements and confronted the assessee with those documents and papers.

(B) The decision of the Supreme Court in COMMISSIONER OF INCOME-TAX Vs. SMT.P.K.NOORJAHAN, reported in [1999] 237 I.T.R. 570, was cited for the proposition that the intention of Parliament for enacting Section 69 of the said Act was to confer a discretion on the Income-tax Officer in the matter of treating source of investment which has not been satisfactorily explained by the assessee as the income of the assessee, and the Income-tax Officer was not obliged to treat such source of investment as income in every case where the explanation offered by the assessee is found to be not satisfactory. It was held that the question whether the source of investment should be treated as income or not under Section 69 of the Act has to be considered in the light of the facts of each case.

(C) The decision of the Supreme Court in SONA BUILDERS Vs. UNION OF INDIA AND ORS., reported in [2002] 251 I.T.R. 197, was cited to point out that in a case where no copy of the document of sale instance was furnished alongwith the notice or at any time whatever, it was held that there was a gross breach of principles of natural justice, because, adequate opportunity to meet the case made out in the notice was not given to the appellant. In that case, the Appropriate Authority held that the apparent consideration of the transaction between the appellant and the transferor was substantially low as compared to the value arrived at on the basis of sale

instance, duly adjusted, passed an order for compulsory purchase of the property by the Central Government. The Supreme Court held that on two counts there had been gross breach of the principles of natural justice and set aside the order on the ground of failure to act in conformity with the principles of natural justice.

(D) The decision of this Court in GLASS LINES EQUIPMENTS CO.LTD. Vs. COMMISSIONER OF INCOME-TAX, reported in [2002] 253 I.T.R. 454, was cited to point out that in a case where in none of the appellate orders was there any discussion in relation to part of the affidavit in which the assessee-Company had made a positive averment to the effect that all other items of expenditure were allowable and there was no indication whatsoever that the Tribunal was even aware of the existence of the affidavit which was on record, it was held that it would not be open to the Revenue to challenge the correctness of the statement made by the deponent in the affidavit, because, none of the authorities considered it necessary to cross-examine the deponent with reference to such statement.

7. The learned Standing Counsel for the Revenue argued that nowhere uptil now was it ever contended that the copy of the report of the Income-tax Inspector was not given to the assessee. He submitted that if the assessee had not received the copy and wanted to rely upon it, he would have surely demanded the same, since the copy was already on record. The presumption therefore was, that the assessee was having such copy. In his letter, only the statements of the witnesses were asked for, which were duly furnished to the assessee. Moreover, the reliance placed by the authority was on the statement of the material witness and the report was not the basis for the conclusions reached by the Income Tax Officer or the Tribunal which restored the Income-tax Officer's order. It was submitted that the Tribunal's findings were findings of fact based on record and the assessee cannot require this Court to reappreciate the evidence in this Reference. It was then argued that the contention now canvassed that since it was the first year of business of the assessee, the income in question could not be treated as undisclosed income of the assessee used in investment, was never raised before any authority including the Tribunal and the said question does not arise from the order of the Tribunal and since the said

question does not arise from the order of the Tribunal, this Court cannot go into it.

7.1 In support of his contention, the learned Standing Counsel relied upon the following decisions:

(a) The decision of the Supreme Court in C. VASANTLAL AND CO. Vs. COMMISSIONER OF INCOME-TAX, reported in [1962] 45 I.T.R. 206, was cited for the proposition that it was open to the I.T.O. to collect materials to facilitate assessment even by private enquiry. But if he desires to use the material so collected, assessee must be informed of the material and must be given an adequate opportunity of explaining it.

(b) The decision of the Supreme Court in COMMISSIONER OF INCOME-TAX Vs. SMT. ANUSUYA DEVI, reported in [1968] 68 I.T.R. 750, was cited for the well settled proposition that the High Court could decline to answer a question of law which does not arise out of the order of the Tribunal. It was held that the High Court was not bound to advise the Tribunal on a question which did not arise out of the order of the Tribunal merely because the High Court called upon the Tribunal to state a case on that question.

(c) The decision of the Supreme Court in LAKSHMIRATAN COTTON MILLS CO.LTD. Vs. COMMISSIONER OF INCOME TAX, reported in [1969] 73 ITR 634, was also cited for the proposition that the High Court could decline to answer the question referred pursuant to its direction if it did not arise out of the order of the Tribunal.

(d) The decision of this Court in COMMISSIONER OF INCOME-TAX Vs. C. SHANTILAL AND CO., reported in [1982] 136 ITR 522, was relied upon for the proposition that no question can be referred to the High Court unless it arises out of the order of the Tribunal. This Court relied upon the various decisions of the Apex Court pointing out that this was a settled legal position. It was held that since the Tribunal was not called upon to consider the question of the validity of the penalty in the light of the provisions of Sections 271(2), the Tribunal had no occasion to deal with such an argument. The question of applicability of Section 271(2) could not also be

said to arise out of the order of the Tribunal.

(e) The decision of the Supreme Court in M.B. ABDULLA Vs. COMMISSIONER OF INCOME-TAX, reported in [1990] 183 I.T.R. 96, was cited to point out that the High Court rejected the application for leave to appeal against an order of the Tribunal refusing to make a Reference under Section 256(1) of the said Act on the ground that the question did not arise out of the order of the Tribunal.

8. From the facts which have been narrated in the earlier part of the judgment, it would at once become clear that the Tribunal has placed reliance upon the statement of Bhupatrai C. Doshi. The assessee was given an opportunity to cross-examine that witness and it transpires from the statement of this witness that the assessee had paid Rs.1 lakh to his wife Vidyaben for handing over the possession of the shop premises. An amount of Rs.20,000/- was also given by the assessee by cheque to them towards the cost of cupboard, `Gadi', `Takkia' etc. We have gone through the statement of Shri Doshi and we are fully satisfied therefrom that there was a categorical admission by Shri Doshi both in his earlier statement and in the cross-examination about the amount of Rs.1 lakh having been paid by the assessee to his wife in lieu of handing over the possession of the premises in question. His statement that Rs.20,000/- were paid by cheque by the assessee was borne out from the books of account of the assessee as held by the Tribunal. The Tribunal also took note of the fact that the shop in question was situated in one of the busiest localities in the city of Rajkot and the assessee had obtained the possession of the shop on payment of the amounts admitted by Mr. Doshi. The Tribunal observed that the landlord in his statement had admitted that earlier tenant was in possession since 25 to 30 years on a monthly rent of only Rs.25/-, and therefore, there was nothing unusual in the said payment having been given to the outgoing tenant. The Tribunal held that the material on record inspired full confidence for reaching the conclusion that the amount in question was paid by way of "pagri". Mr. Doshi has stated that he was told by his wife Vidyaben that the amount of Rs.1,20,000/- was paid by the assessee. There could not be more authentic evidence forthcoming than the evidence of the husband who would be having knowledge of the fact of Vidyaben having received Rs.1,20,000/-from the assessee for vacating the shop premises occupied by their firm for 25 to 30 years. The affidavit of Vidyaben which is belatedly produced by the assessee before the Inspecting Assistant Commissioner of

Income-tax is obviously an after thought to bolster up the case of the assessee and cannot dislodge the reliable version of Bhupatrai C. Doshi. All these are in realm of appreciation of evidence and we do not find any perversity in the conclusions reached by the Tribunal which are based on the material on record.

9. The contention that report of the Income-tax Officer Mr. Vyas was not supplied to the assessee has no basis. There is nothing on record to indicate that a copy of the report was not given to the assessee and the argument is darted for the first time before this Court. It is clear from the draft order of the I.T.O. that a copy of the report was placed on record. If the assessee had not been supplied with a copy of that report, surely it would have been asked for while seeking copies of the statements of witnesses which were duly furnished to the assessee pursuant to its letter. No grievance was made even before the Tribunal about non supply of copy of the report of the Inspector. The contention that the copy of the report was not made available to the assessee is, therefore, devoid of any substance.

10. The argument which is now put up for the first time that the amount in question could not have been added in the income of the assessee-firm because it was the first year of its business cannot at all be countenanced for the simple reason that no such contention was ever raised and it cannot be allowed to be raised for the first time since the Tribunal had no occasion to decide such question, and therefore, it does not arise from the order of the Tribunal. We have already referred to the decisions of the Supreme Court which clearly lay down that a question which does not arise from the order of the Tribunal cannot be opined upon by this Court. This position was settled long back by the Supreme Court in the case of COMMISSIONER OF INCOM-TAX Vs. SCINDIA STEAM NAVIGATION CO.LTD. [1961] 42 I.T.R. 589, in which it was held that the jurisdiction of the High Court in a reference under section 66 of the Income-tax Act, 1922, is a special one, different from its ordinary jurisdiction as a civil court. The High Court hearing a reference under that section did not exercise any appellate, revisional or supervisory jurisdiction over the Tribunal but acted purely in an advisory capacity, on a reference which properly came before it under section 66(1) and (2) of the Act of 1922 (the provisions corresponded to Sec.256(1) and (2) of the Act of 1961). It was held that it is of the essence of such a jurisdiction that the Court can decide only questions which are referred to it

and not any other questions. When a question of law is neither raised before the Tribunal nor considered by it, it would not be a question arising out of its order. It was held that all that Sec.66(1) required was that the question of law which was referred to the Court for decision and which the court is to decide must be the question which was in issue before the Tribunal. We do not find it necessary to dilate on the point any further and hold that it is not open for the assessee to raise this contention for the first time before this Court since it does not arise from the order of the Tribunal.

11. In the above view of the matter, we hold that the Tribunal had not committed any error while confirming the addition of Rs.1,40,000/- as the income of the assessee as was ordered by the I.T.O. and tThe question referred to us is answered against the assessee and in favour of the Revenue. The Reference stands disposed of accordingly with no order as to costs.

(R.K.Abichandani,J.)

(Kundan Singh,J.)

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